

N O. 2 1 8 2 1  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRED PATRICK MEYERS,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

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1

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION

On December 22, 1966, the Federal Grand Jury for the Central District of California returned an indictment in five counts. Four counts of this indictment charged that Fred Patrick Meyers committed the following offenses within the Central District of California:

Count I: Violation of Title 21, United States Code, Section 174, in that on or about September 22, 1966, defendant Meyers knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 24.655 grams of heroin which he



knew had been previously unlawfully imported.

Count II: Violation of Title 21, United States Code, Section 174, in that defendant Meyers sold to Agent David L. Westrate of the Federal Bureau of Narcotics the 24.655 grams of heroin described in Count I above.

Count III: Violation of Title 21, United States Code, Section 174, in that on or about October 3, 1966, defendant Meyers and Lois Ellen Blalock sold and facilitated the sale to an undercover assistant of the Federal Bureau of Narcotics 37.140 grams of heroin which they knew had been previously unlawfully imported.

Count V: A violation of Title 21, United States Code, Section 176(a), in that on or about October 18, 1966, defendant Meyers knowingly and with intent to defraud the United States, received, concealed, and facilitated the transportation and concealment of 720.400 grams of marihuana which he knew had been previously unlawfully imported into the United States [C. T. 1-6]. <sup>1/</sup> During trial Count Five was dismissed on motion of the government [R. T. 56].

On January 5, 1967, the Court, being informed that there is reasonable cause to believe that the defendant and appellant was insane or otherwise mentally incompetent, appointed Dr. Edwin McNeil, Dr. Frederick Wetzel and Dr. Patrick J. Lovelle to examine defendant Meyers with specific instructions to report to the Court concerning the sanity of said defendant on the date of said

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<sup>1/</sup> C. T. refers to Clerk's Transcript and R. T. refers to Reporter's Transcript.



examination and whether the said defendant was presently under the influence of narcotics and to render their report in writing to said Court with copies thereof to defendant Meyers' counsel.

On January 1, 1967, a waiver of jury trial was filed and defendant Meyers was arraigned and plead not guilty [C. T. 11-13]. A court trial was held on February 8, 1967, before the Honorable Jesse W. Curtis, United States District Judge. Motions for judgment of acquittal made at the close of the government's case and renewed at the close of the defendant's case were denied. The defendant was found guilty on Counts One, Two, and Three.

On February 17, 1967, appellant filed a motion for new trial.

On March 6, 1967, an information was filed charging that on or about the 26th of April, 1965, defendant Meyers was convicted of a violation of Title 26, United States Code, Section 4724(a), the importation of narcotics without payment of taxes, and was sentenced by the court for a period of three years, execution of the sentence being suspended and the defendant placed on probation for a period of three years on certain conditions, namely, that he not use barbiturates, marijuana or narcotics in any form, nor associate with users, nor approach the Mexican Border, nor enter Mexico, and to submit to Naline tests as the Probation Department may require [C. T. 31-32]. On April 10, 1967 the trial court found the allegation contained in the information was true [R. T. 171].

On April 10, 1967, defendant Meyers was sentenced to imprisonment for a period of ten years each on Counts One, Two



and Three to run concurrently, with a recommendation that defendant be committed to a United States Public Health Hospital facility for treatment for possible narcotic addiction [C. T. 38].

On April 20, 1967, defendant filed a timely notice of appeal [C. T. 42].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

## II

### STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part, as follows:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000 . . . .

"For a second or subsequent offense the





offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000."

### III

#### QUESTION PRESENTED

Whether the trial court properly sentenced the addicted defendant to ten years imprisonment for the sale and concealment of heroin under Title 21, United States Code, Section 174, rather than under Title 18, United States Code, Section 4251.

### IV

#### STATEMENT OF THE FACTS

On or about September 22, 1966 an agent and an undercover assistant of the Federal Bureau of Narcotics met the defendant Fred Meyers at a Standard Service Station [R. T. 57 and 58]. The agent and assistant told the defendant that they were selling heroin in small amounts and that the heroin they wanted to purchase would be broken up and sold to several people [R. T. 60]. Meyers stated that he had heroin "stashed" a few blocks away. When asked by the agent to get the heroin and bring it to the station so that a sale could be consummated, the defendant said that he did not know the agent and didn't want to do it that way [R. T. 60]. The defendant stated that the assistant could go with him to a nearby location where the



heroin was hidden and then the defendant would return to the agent for the money [R. T. 61]. The assistant and the defendant then proceeded in the defendant's automobile to an open field on Napa Street and the defendant indicated the location of a prophylactic containing heroin [R. T. 13]. On the return trip to the service station, the defendant told the assistant that "it was good junk" and his "customers would like it" [R. T. 14]. The defendant also directed the assistant to let him know if he needed any more within a couple of days, but to come alone since he didn't know the agent and didn't trust anybody [R. T. 14].

The defendant and the assistant subsequently returned to the service station. The assistant told the agent that "everything was all right, it was as Mr. Meyers had said it would be" [R. T. 62]. The defendant then asked the agent for the money. The agent took \$300 in government funds and attempted to hand it to the defendant. However, the defendant said, "No, No. Hold it out so I can see it and count it." After the agent counted the money, he again attempted to hand the money to the defendant but the defendant stated that he didn't want to touch the money. He directed the agent to put the money on the back seat of the automobile and the agent complied [R. T. 63]. Defendant Meyers then told the agent that the heroin was good but "not to cut it and that the agent's customers would be happy with it". His parting statement was, "Be careful who you deal to. There is a lot of Heat and you can't trust anybody." [R. T. 64].

The agent and assistant then proceeded to the previously described Napa Street location where the assistant pointed out a



rubber contraceptive containing heroin next to the sidewalk in high grass [R. T. 65 and 66].

On or about October 3, 1966, the assistant and agent telephoned Fred Meyers and made arrangements to purchase 40 grams of heroin for \$500 [R. T. 69 and 70]. Defendant Meyers told the assistant that he would not sell the heroin if the agent were there because he didn't trust the agent [R. T. 20 and 71]. Defendant Meyers then met with the assistant at a Safeway Market and told the assistant to follow him in the assistant's car [R. T. 20]. The defendant proceeded in his own car to a nearby location, followed by the assistant [R. T. 21]. They alighted from their automobiles and the assistant followed the defendant to another vehicle that was parked on the corner [R. T. 21]. The assistant gave defendant Meyers \$500. A female sitting in the automobile then handed the assistant a prophylactic containing approximately 40 grams of heroin [R. T. 22]. The assistant then placed the contraceptive on the front seat of the automobile and returned to the agent [R. T. 22 and 73].

In his defense, appellant denied selling or giving heroin to the agent and assistant on September 22 and October 3, 1966 [R. T. 99-108]. He also asserted that he had been previously convicted of grand theft, burglary and failing to pay tax on heroin that he had smuggled [R. T. 99].



ARGUMENT

- A. SENTENCE OF THE APPELLANT UNDER TITLE 21, UNITED STATES CODE, SECTION 174 WAS LAWFUL AND PROPER IN ALL RESPECTS, AND IN FULL ACCORDANCE WITH THE PROVISIONS OF THE NARCOTIC REHABILITATION ACT OF 1966.
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Appellee concedes that the appellant in this case was addicted to the use of narcotics at the time he was examined by various doctors [App. Br. , pp. 11-13, 19-21]. However, there is nothing in reported cases or in statutes and testimony cited by appellant which would compel the trial court to sentence the defendant under the Narcotic Rehabilitation Act of 1966. Title 18, United States Code, Section 4251, et seq.

On the contrary, the record indicates that this appellant is ineligible to be sentenced under this act. Title I excludes from eligibility an individual charged with unlawfully selling a narcotic drug. Title 28, United States Code, Section 2901(g)(2). Title II excludes defendants who have been convicted of a felony on two or more prior occasions. Title 18, United States Code, Section 4251(c)(4). The record in this case, including appellant Meyers' own testimony, indicates that appellant was convicted of three prior felonies and would therefore be ineligible [R. T. 99, 171].

Even admitting for purposes of argument only that appellant was eligible to be sentenced under the Narcotic Rehabilitation Act of





1966, the sentence of the trial court was lawful and proper in all respects. Title 21, United States Code, Section 174, provides that whoever sells any narcotic drug after it has been illegally imported, knowing it to have been imported into the United States contrary to law, shall be imprisoned not less than five or more than twenty years. Therefore, the ten-year sentence of the trial court was well within the statutory limits provided by Congress for sale of heroin and may not be disturbed on appeal.

United States v. Cohen, 177 F.2d 523, 525

(2nd Cir. 1949), cert. denied 70 S. Ct. 568.

If there is one rule in the Federal Criminal Practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.

Gurara v. United States, 40 F.2d 338, 340

(8th Cir.);

United States v. Rosenberg, 195 F.2d 583, 604

(2nd Cir. 1952).

Nor is there anything in the Narcotic Rehabilitation Act of 1966 which would support appellant's contention that the court erred in failing to invoke the statutory procedure under that statute. As indicated previously, the record indicates that the defendant is not eligible under the Act. The Act further indicates that invocation of its procedures is entirely discretionary with the trial court. As appellant admits, the provisions applicable to this matter are contained under Title II of the Act, 18 United States Code, Sections 4251 - 4255 inclusive. Appellant also admits that commitment for



an examination under Section 4252 is discretionary with the court [App. Br. p. 45]. <sup>2/</sup> Final commitment to the Attorney General for treatment under Section 4253 may not be invoked until the judge has decided to order an examination. By making the order for examination of convicted defendants under the act discretionary with the trial court, and by leaving the sentencing procedures of Title 21 untouched, the intent of Congress to leave to the trial court the alternative of invoking either sentencing procedure is clear.

That this was the Congressional intent is further indicated by the enactment of Title VI of the Narcotic Rehabilitation Act of 1966. This section provides that:

"The Surgeon General is authorized to provide for confinement, care, protection, treatment, and discipline of persons addicted to the use of habit-forming narcotic drugs . . . [who have been] . . . convicted of offenses against the United States and who are not sentenced to treatment under the Narcotic Addict Rehabilitation Act of 1966 . . . ." Title 42, United States Code, Section 257(a) (emphasis added).

The sentence of the trial court here under attack was in full accord with the spirit and purpose of the Narcotic Rehabilitation Act

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<sup>2/</sup> Title 18, United States Code, Section 4252 provides in pertinent part: "If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment." (emphasis added).



of 1966. Title VI, quoted in pertinent part above, clearly contemplates that there will be narcotic addicts not sentenced under the discretionary provisions of Title II. That section provides facilities for the care, protection, treatment, and discipline of such persons. The recommendation of the trial court to the Bureau of Prisons that the defendant be "incarcerated in a hospital where he can receive help for his addiction" is a clear indication of the trial court's intention that the provisions of Title VI be utilized for this defendant.

It is further submitted that the trial court had good reason for imposing the ten-year sentence and recommending hospitalization. This appellant had, by his own admission, been convicted of three prior felony offenses. At trial he denied making the sales of heroin in ounce quantities for which he was subsequently convicted in the case at bar [R. T. 99-108]. As defense counsel pointed out to the trial court immediately after sentence was imposed:

"You have expressed yourself candidly and fairly with us that you feel that he (the defendant) must be protected not only from himself but also that society must be protected." [R. T. 190].

In view of the provisions in Title II that an offender committed under Section 4253(a) may be conditionally released after six months (Title 18, United States Code, Section 4254), it is submitted that the sentence and recommendation by the trial court in this case was both fair and wise under the circumstances.



VI

CONCLUSION

Since the sentence of the appellant was a lawful and proper exercise of the trial court's discretion under Title 21, United States Code, Section 174, and under the Narcotic Rehabilitation Act of 1966, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir  
MICHAEL D. NASATIR

